



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2004

Ms. Susan C. Rocha
Denton, Navarro, Rocha & Bernal
2517 N. Main Avenue
San Antonio, Texas 78212

OR2004-5654

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205053.

The San Antonio Water System ("SAWS") received a request for (1) records related to the SAWS purchase of security cameras and a wireless closed circuit television system, (2) correspondence between SAWS and a named individual, (3) communications regarding the installation, operation, and maintenance of the security system, (4) and invoices, bills, purchase order, or checks to and from "Wonderlink Malich." You state that SAWS will provide some of the requested information to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.111, and 552.136 of the Government Code.¹ Additionally, you state, and provide documentation showing, that you have notified three interested parties, Wunderlich-Malec Engineering System Services ("Wunderlich"), AIS Investigations, Inc., d/b/a Digital Video Surveillance Systems ("DVSS"), and ADT Security Services, Inc. ("ADT"), of this request and of their right to submit arguments to this office as to why information pertaining to each third party should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

¹We note that you also raise sections 552.102, 552.103, 552.105, 552.108, 552.109, 552.113, 552.116, 552.117, 552.1175, 552.122, 552.128, 552.129, 552.130, 552.131, 552.137, and 552.139 of the Government Code. However, you have not provided any arguments explaining how these exceptions are applicable to the submitted information. Therefore, we presume you no longer assert these exceptions to disclosure. *See* Gov't Code §§ 552.301, .302.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Wunderlich, DVSS, nor ADT has submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Thus, we have no basis to conclude that Wunderlich, DVSS, or ADT has a protected proprietary interest in any of the submitted information. *See, e.g.,* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, none of the submitted information may be withheld based on the proprietary interests of any third party.

You argue that some of the submitted information, which you have marked, is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. You raise section 552.101 in conjunction with sections 418.181 and 418.182 of the Government Code. As part of the Texas Homeland Security Act, the Seventy-eighth Legislature passed House Bill 9, which added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.181 provides "[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism." Gov't Code § 418.181. Section 418.182 provides:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under Chapter 552.

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education Code, is public information and is not excepted from required disclosure under Chapter 552 unless the security camera:

(1) is located in an individual personal residence for which the state provides security; or

(2) is in use for surveillance in an active criminal investigation.

Gov't Code § 418.182. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under House Bill 9. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). The mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You explain that SAWS provides water and wastewater services to approximately 1 million people in the San Antonio metropolitan area. You state that water and electricity services are "the most vulnerable components of a municipality and should an emergency or disaster occur, our citizens should be able to rely on SAWS for basic water services." You also state that if portions of the submitted information were released, the safety of the city of San Antonio's water supply could be jeopardized. You argue that certain information you have marked under section 418.181 "details the problems and failures with the security system and the exact locations where the security system has been identified as faulty or ineffective." After reviewing your arguments and the submitted information you seek to withhold pursuant to section 418.181, we find that you have demonstrated that the release of this information would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See generally* Gov't Code § 421.001 (defining "critical infrastructure" to "include [] all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation"). Thus, this information, which you have marked, must be withheld under section 552.101 in conjunction with section 418.181 of the Government Code.

Next, you argue that certain information you have highlighted under section 418.182 of the Government Code is confidential because it "detail[s] the location, type of equipment, power source, operating procedures, and security positions of these [security] cameras." After reviewing your arguments and the information you seek to withhold pursuant to section 418.182, we find that you have demonstrated that most of this information relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism. Accordingly, with the exception of the information we have marked for release, the information you have marked must be withheld under section 552.101 in conjunction with section 418.182 of the Government Code.²

²Because our ruling on this information is dispositive, we need not address your arguments under section 552.110 of the Government Code, except to note that by its terms, section 552.110 only protects the interests of the person from whom the information was obtained. The provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. *See* Gov't Code § 552.110.

Next, you argue that some of the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us that the information you seek to withhold pursuant to section 552.104 "contains notes and comments by SAWS staff that details negotiations with the contractor." You state that the notes "delineate new provisions and additional requirements that the contractor must meet and are all part of the negotiating process." You do not indicate, however, that this information relates to a competitive bidding situation or that this information is otherwise connected with any ongoing competition for a public contract. Consequently, we find that you have not demonstrated that the release of this information at this time would adversely affect SAWS's interests in any particular competitive situation. *See* Open Records Decision Nos. 592 at 8 (1991), 541 at 5 (1990); *see also* Open Records Decision Nos. 583 (1990) (statutory predecessor to section 552.104 did not restrict access to information because it might be commercially useful to requestor), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). We therefore conclude that SAWS may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, you argue that a portion of the submitted information, which you have marked, is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the

individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that a portion of the submitted information, which you have marked, consists of communications between SAWS and its attorney, and that these communications were made in furtherance of the rendition of professional legal services to SAWS. Upon review of your arguments and this information, we conclude that it is protected by the attorney-client privilege, and thus may be withheld under section 552.107(1) of the Government Code.

You also argue that certain bank routing and account numbers you have marked are excepted under section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. Thus, the account numbers we have marked are confidential and therefore must be withheld under section 552.136 of the Government Code.

In summary, we conclude SAWS must withhold the information it has marked under section 552.101 in conjunction with sections 418.181 and 418.182 of the Government Code, except for the information we have marked for release. SAWS must also withhold the

information we have marked under section 552.136 of the Government Code. SAWS may withhold the information it has marked under section 552.107 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 205053

Enc. Submitted documents

c: Mr. Jeff Coyle
WOAI-TV
1031 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)

Mr. Frank M. Mahnich
Regional General Manager
Wunderlich – Malec Engineering System Services
3720 Arapaho Road
Addison, Texas 75001
(w/o enclosures)

Mr. Steven Ballard
President, AIS Investigations, Inc.
DBA Digital Video Surveillance Systems (DVSS)
9918 McCullough Avenue
San Antonio, Texas 78216
(w/o enclosures)

Mr. Jim Murray
National Account Manager
ADT Security Services, Inc.
140 Heimer Road, Suite 600
San Antonio, Texas 78232
(w/o enclosures)